No. 1801.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

F. E. EARNHART,

Appellant,

vs.

JOHN B. SWITZLER,

Appellee.

Appelee's Petition for Rehearing

Upon appeal from the United States Circuit Court for the District of Oregon.

R. J. SLATER AND JAMES A. FEE,

Solicitors for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

F. E. EARNHART,
Appellant,

vs.

JOHN B. SWITZLER,
Appellee.

Petition for Rehearing

Comes now John B. Switzler, appellee in the above entitled cause, and most respectfully petitions this honorable court for a rehearing in this cause upon the following grounds:

1.

This honorable court in its decision filed herein upon the 9th day of May, 1910, erroneously stated that, "It is not shown, nor can it be, that any constitutional or statutory question is involved in the present case."

2.

And the court, also, erroneously held as follows: "But there is no general statute which, in express terms, permits or protects settlement upon unsurveyed public land. In dealing with the questions involved in the present suit, the court is not

called upon to construe any provisions of the Federal Constitution of Statutes."

R. J. SLATER & JAMES A. FEE,

Solicitors for Appellee.

I, R. J. Slater, hereby certify that I am one of the counsel and solicitors for the above named appellee, and that I have carefully read and considered the opinion of this honorable court rendered in this cause, upon the 9th day of May, 1910, and in my judgment the above motion is well founded, and said petition is not interposed for delay.

Dated this 26th day of May, 1910.

ARGUMENT.

Upon reading the decision of this honorable court in this cause we were very much surprised at the statement of the court to the effect that there was no statute of the United States which in express terms permits or protects settlement upon unsurveyed public land. It seems possible that the court may have been misled by a mistake, which appears upon the title page of the appellee's brief, which was filed by us in support of the bill of complaint. The mistake being that the brief appears from the title page as appellant's brief instead of appellee's brief, from which it seems possible that the court may have overlooked our argument and in particular the points and authorities cited therein.

Upon the commencement of this case we predicated the same upon the 3rd section of the Act of Congress, approved May 14, 1880, 21 Statutes at Large, page 140, which statute

we understand to be a general statute, which grants and confers upon settlers upon the unsurveyed lands of the United States a preference right to enter the same over all other persons as soon as the same are surveyed and the plat thereof filed in the proper Land Office, and that such rights by the express provision of the statute relate back to the date of settlement with the same force and effect as if the settlement had been under the Pre-emption Laws which were upon the statute books at the time that law was enacted, and in this case, it is absolutely necessary for the court, in dealing with the matter set forth in the complaint to construe and apply that Act, for there is no other statute or law applying to such cases under which a settler upon unsurveyed lands of the United States could claim any rights. The language of the section referred to is as follows: "That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the Homestead Laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the Pre-emption laws to put their claims on record, and his rights shall relate back to the date of settlement, the same as if he settled under the Pre-emption laws."

In the case of Nelson vs. Northern P. R. Co., 188 U. S., 108, Justice Harlan in construing the statute referred to uses the following language, "The third section of this statute is a distinct confermation of the rights of a qualified person who had theretofore settled or should thereafter settle on any of the public lands of the United States, whether surveyed or

unsurveyed, with the intention of claiming the same under the Homestead law."

In the case of St. Paul, M. & N. R. C. vs. Donohue, 210 U. S. 21, Justice White in construing the same section uses the following language, "It was not until May 14, 1880, that a Homestead entry was permitted to be made upon unsurveyed public lands. The statute which operated this important change moreover modified the Homestead law in an important particular. Thus for the first time, both as to the surveyed and unsurveyed Public lands, the right of the Homestead settler was allowed to be initiated by and to arise from the act of settlement, and not from the record of the claim made in the land office. These results arose from Sec. 3 of the Act."

The above statute and authorities bring this case squarely within the rule laid down by the Supreme Court of the United States in McCune vs. Essig, 199 U. S., 382, 50 L. Ed. 237, and Spokane Falls & N. R. Co. vs. Zigler, 167 U. S. 65, 42, L. Ed. 79.

We, therefore, most earnestly contend that the complaint does present a Federal question, and urge that the court should change its decree accordingly.

Most respectfully submitted,

R. J. SLATER & JAMES A. FEE,

Solicitors for Appellee.